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The Breakdown of the International Commercial Arbitration System: The Kabab-Ji Case

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THE BREAKDOWN OF THE INTERNATIONAL COMMERCIAL ARBITRATION SYSTEM: THE KABAB-JI CASE

By
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I. INTRODUCTION

The Lebanese dining chain, Kabab-Ji, signed a Franchise Development Agreement ("FDA") in 2001 with the Al Homaizi Foodstuff Company ("AHFC") to run the Kabab-Ji's franchise in Kuwait for ten years.[1] Under the FDA, the parties chose English law as the governing law of the contract.[2] The contract included an agreement to arbitrate any dispute from the contract at the International Chamber of Commerce ("ICC") in Paris.[3] However, the arbitration agreement did not explicitly specify what governing law would apply.[4] In 2005, AHFC underwent a corporate reorganization becoming a subsidiary of Kout Food Group ("KFG").[5] A dispute arose between KFG and Kabab-Ji resulting in Kabab-Ji bringing arbitral proceedings at the ICC against KFG as AHFC's parent corporation.[6] KFG argued that they were not a party to both the FDA and the arbitration

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1. *See* Jamie Maples, Frankie Cowl & Rhys Williams, *UK Supreme Court Confirms Key Principles Concerning the Governing Law of Arbitration Agreements: Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait) [2021] UKSC 48*, IN BRIEF: EUROPEAN DISPUTES BLOG (Dec. 16, 2021), https://european-disputes-blog.weil.com/england-uk/uk-supreme-court-confirms-key-principles-concerning-the-governing-law-of-arbitration-agreements-kabab-ji-sal-lebanon-v-kout-food-group-kuwait-2021-uksc-48/; *see also* Tim Fox, *UK Supreme Court Provides Further Guidance on the Governing Law of an Arbitration Agreement: Kabab-Ji Sal (Lebanon) v Kout Food Group (Kuwait)*, NAT'L LAW REVIEW (Nov. 3, 2021), https://www.natlawreview.com/article/uk-supreme-court-provides-further-guidance-governing-law-arbitration-agreement-kabab.

2. *See* Rebecca Williams, *Kabab-Ji Sal (Lebanon) v. Kout Food Group (Kuwait): A Palatable Outcome*, WATSON FARLEY & WILLIAMS (Nov. 9, 2021), https://www.wfw.com/articles/kabab-ji-sal-lebanon-v-kout-food-group-kuwait-a-palatable-outcome/; *see also* Maples, *supra* note 1; Fox, *supra* note 1.

3. The International Chamber of Commerce is an international business organization headquartered in Paris, France that provides arbitral tribunals to resolve disputes. *See* Maples, *supra* note 1; *see also* Fox, *supra* note 1.

4. *See* Maples, *supra* note 1; *see also* Fox, *supra* note 1; Williams, *supra* note 2.

5. *See* Maples, *supra* note 1; *see also* Fox, *supra* note 1.

6. *See* Craig Tevendale & Elizabeth Kantor, *HSF Analysis of Supreme Court Decision in Kabab-Ji Sal (Lebanon) v Kout Food Group (Kuwait)*, HERBERT SMITH FREEHILLS: ARB. NOTES (Nov. 2, 2021), https://hsfnotes.com/arbitration/2021/11/02/hsf-analysis-of-supreme-court-decision-in-kabab-ji-lebanon-v-kout-food-group-kuwait/; *see also* Maples, *supra* note 1; Fox, *supra* note 1; Williams, *supra* note 2.

agreement.[7] The ICC arbitral tribunal disagreed with KFG, holding that it was a party to the arbitration agreement, and awarding damages to Kabab-Ji.[8] The tribunal applied French law to the arbitration agreement on the basis that the law of the seat is applied when an arbitration agreement's choice of law is silent.[9]

Kabab-Ji then initiated enforcement proceedings in English courts to have the arbitral award enforced.[10] The lower English courts stated that when an arbitration agreement is silent, the choice of law applied is the one governing the underlying contract.[11] Therefore, the English law should apply to the arbitration agreement.[12] The lower English courts held that KFG was not a party to the agreement and not in breach of the FDA.[13] The U.K. Supreme Court subsequently upheld the lower English courts' ruling.[14] Concurrently, KFG sought to annul the arbitral award by bringing an annulment proceeding to the Paris Court of Appeal.[15] The Paris Court of Appeal dismissed the action upholding the arbitral tribunal ruling that the law of the arbitration seat governs.[16]

This article will focus on the U.K. Supreme Court's decision and the Paris Court of Appeal's decision regarding the choice of law dispute between KFG and Kabab-Ji. First it will focus on the Paris Court of Appeal's decision and how French courts have applied the law of the seat when arbitral agreements are silent on the choice of law. It will then analyze the recent U.K. Supreme Court's decision and how English courts apply the general contract's choice of law to the arbitration agreement. This article will reveal how both interpretations of the arbitration clause are in accordance with each country's choice of law jurisprudence and the 1958 New York Convention. It will then argue that these English and French interpretations must be reconciled to protect the uniformity and integrity of international commercial arbitration. This article will conclude that these interpretations

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7. *See* Teyendale, *supra* note 6; see *also* Maples, *supra* note 1; Fox, *supra* note 1; Williams, *supra* note 2.

8. *See* Teyendale, *supra* note 6; *see also* Maples, *supra* note 1; Fox, *supra* note 1; Williams, *supra* note 2.

9. *See* Maples, *supra* note 1; *see also* Fox, *supra* note 1; GARY B. BORN, INTERNATIONAL ARBITRATION: LAW AND PRACTICE 105 (2016) (The law of the seat of arbitration is considered the place where parties specified the arbitration will happen or "where an international arbitration has its legal domicile or juridical home").

10. *See* Maples, *supra* note 1; *see also* Fox, *supra* note 1; Williams, *supra* note 2 (KFG operates in the U.K. as well as Kuwait).

11. *See* Maples, *supra* note 1; *see also* Fox, *supra* note 1.

12. *See* Maples, *supra* note 1; *see also* Fox, *supra* note 1; Williams, *supra* note 2.

13. *See* Maples, *supra* note 1; *see also* Fox, *supra* note 1; Williams, *supra* note 2.

14. *See* Maples, *supra* note 1; *see also* Fox, *supra* note 1; Williams, *supra* note 2.

15. *See* Sudhanshu Swaroop & Joshua Folkard, *A Tale of Two Choices of Law Rules: Kabab-Ji SAL v Kout Food Group*, TWENTY ESSEX BULLETIN (Dec. 2021), https://www.twentyessex.com/wp-content/uploads/2021/12/A-Tale-of-Two-Choice-of-Law-Rules-Kabab-Ji-SAL-v-Kout-Food-Group.pdf.

16. *See id*.

can only be reconciled based on a validation principle where, if there is plausible legal basis in one national jurisdiction, the pro-enforcement ruling supersedes the non-enforcement ruling in the other national jurisdiction. Therefore, the U.K. Supreme Court should have enforced the arbitral award based on the validation principle notwithstanding its choice of law jurisprudence.

II. BACKGROUND

A. Contract between Kabab-Ji and AHFC

The dispute between Kabab-Ji and KFG originated on July 16, 2001, when AHFC, signed a ten-year FDA with Lebanese Kabab-Ji to operate their dining chain.[17] The FDA required that AHFC and Kabab-Ji enter into a special Franchise Outlet Agreement (FOA) for every franchise created in Kuwait.[18] The agreements stated that English law would be the choice of law applied.[19]

Article 14 of the FDA contained a dispute resolution clause requiring "'any dispute, controversy or claim'" between the two corporations "'arising out of or relating to this Agreement or the breach thereof '" to be decided "'under the Rules of Conciliation and Arbitration of the International Chamber of Commerce'".[20] The arbitration agreement does not state what choice of law applies, the agreement only declares that "'[t]he arbitrator(s) shall also apply principles of law generally [recognized] in international transactions.'"[21] The agreement also included a No Oral Modification clause.[22] The arbitration agreement stated that "'[t]he arbitration shall be conducted . . . in Paris, France'" at the ICC.[23] In 2005, AHFC underwent a corporate reorganization becoming a subsidiary of a new corporation,

17. *See* Paris Cour'd appel [CA] [Paris Court of Appeal] Paris, Pole 1 Chamber 1, June 23, 2020, 17/22943, 2 (Fr) (English translation prepared by French registered Avocats at Brown Rudnick); *see also* Maples, *supra* note 1; *see also* Fox, *supra* note 1.

18. *See* Paris Cour'd appel [CA] [Paris Court of Appeal] Paris, Pole 1 Chamber 1, June 23, 2020, 17/22943, 2 (Fr).

19. *See id*.

20. AKIN GUMP STRAUSS HAUER & FELD LLP, INTERNATIONAL ARBITRATION ALERT: THE LAW OF AN ARBITRATION AGREEMENT: IS IT THE LAW OF THE SEAT OR THE LAW OF THE UNDERLYING CONTRACT? 2 (2020), https://www.akingump.com/a/web/113642/aokJR/the-law-of-an-arbitration-agreement-is-it.pdf (quoting Article 14 of the FDA between the AHFC and Kabab-Ji).

21. *Id*. (quoting Article 14.3 of the FDA).

22. "No Oral Modification Clause" are generally clauses that prevent the contract being amended through oral communication. Instead, the parties stipulate that only through writing should the contract be amended. *See id*. (quoting Article 14.3 of the FDA "Under no circumstances shall the arbitrator(s) apply any rule(s) that contradict(s) the strict wording of the Agreement").

23. *Id*. (quoting Article 14.5 of the FDA).

KFG.[24] Kabab-Ji consented to this reorganization as long as it did not affect the FDA and FOAs.[25]

B. Arbitration at the ICC

On March 27, 2015, Kabab-Ji initiated arbitral proceedings against KFG at the ICC over a dispute under the FDA signed between Kabab-Ji and AHFC.[26] The arbitral tribunal faced the jurisdictional question of whether KFG had become an additional party to the FDA and henceforth, a party to the arbitration agreement based on AHFC's reorganization.[27] The tribunal had to decide "(i) which law governed . . . the arbitration agreement [and] (ii) whether, under that law, KFG had become a party to the arbitration agreement."[28]

On September 11, 2017, the tribunal rendered its award in favor of Kabab-Ji.[29] The tribunal unanimously found that French law governed the arbitration agreement and that English law governed whether a transfer of the FDA and FOAs substantive rights and obligations to KFG had occurred.[30] A majority of the tribunal concluded that KFG is a party to the arbitration agreement within the FDA based on a novation which was inferred by the conduct of the parties.[31] It found this despite the "No Oral Modification"

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24. *See* Maples, *supra* note 1; *see also* Fox, *supra* note 1.

25. *See* Paris Cour'd appel [CA] [Paris Court of Appeal] Paris, Pole 1 Chamber 1, June 23, 2020, 17/22943, 2 (Fr).

26. None of the decisions or sources describe the specific dispute that arose under the FDA that led Kabab-Ji to initiate arbitration proceedings against KFG. However, reading the Paris Court of Appeal decision, the court summarized the arbitral award which required KFG to pay $892,945 to Kabab-Ji for unpaid monthly License fees and $4,631,841 for Kabab-Ji's loss of chance claim. Thus, one can infer that Kabab-Ji's disputes with KFG involved unpaid monthly fees and a loss of chance claim. *See id.; see also, e.g.*, Tevendale, *supra* note 6.

27. *See* Craig Tevendale & Elizabeth Kantor, *UK Supreme Court Unanimously Dismisses Appeal in Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait)*, HERBERT SMITH FREEHILLS: ARBITRATION NOTES (Oct. 27, 2021), https://hsfnotes.com/arbitration/2021/10/27/uk-supreme-court-unanimously-dismisses-appeal-in-kebab-ji-sal-lebanon-v-kout-food-group-kuwait/.

28. *See id.*

29. *See, e.g.*, Paris Cour'd appel [CA] [Paris Court of Appeal] Paris, Pole 1 Chamber 1, June 23, 2020, 17/22943, 2 (Fr) (the specific award is not unavailable online for viewing. The award is however summarized by the French and English courts when previewing the background.).

30. *See, e.g.,* Tevendale, *supra* note 27.

31. *See id*. (In other words, the tribunal found that when AHFC went through corporate restructuring and became KFG, that KFG became substituted into the FDA. This is referred to in contract law as novation.).

clauses within the arbitration agreement and the FDA.[32] The tribunal determined on the merits of the disputes that KFG was in breach of the FDA.[33]

III. ENGLISH CASE PROCEDURAL HISTORY

A. London High Court Decision

On December 13, 2017, Kabab-Ji initiated proceedings in the Commercial Court of the London High Court ("High Court") to enforce the award against KFG.[34] Like the ICC tribunal, the London High Court Judge first decided which law applied to the arbitration agreement.[35] The High Court summarized "the competing" views for implied choice of law: the law of the general contract and law of the seat of arbitration.[36] Analyzing the question from an English law perspective, the High Court indicated that it made more sense to apply the law of the underlying contract rather than the law of the seat.[37]

However, unlike the ICC tribunal, the High Court did not reach that conclusion on implied choice of law because it ruled that the parties explicitly chose English law to govern the arbitration agreement in Article 14.[38] The High Court read that Article 14.3 specifically provided that "arbitrators shall apply the provisions contained within" the FDA including the English choice of law provision in Article 15.[39] Thus, English law should apply to the arbitration agreement as it applied to the rest of the FDA.[40]

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32. *See id*.

33. *See id.*; *see also* Paris Cour'd appel [CA] [Paris Court of Appeal] Paris, Pole 1 Chamber 1, June 23, 2020, 17/22943, 2-3 (Fr) (One of the arbitrators dissented, arguing that even though French law governed the arbitration agreement, he found that KFG did not become a party to the arbitration agreement or the FDA.).

34. *See* Maples, *supra* note 1; *see also* Fox, *supra* note 1; Williams, *supra* note 2.

35. *See* Kabab-Ji SAL v. Kout Food Grp. [2020] EWCA (Civ) 6 [¶¶ 10-11] (appeal taken from High Ct. of Just. Bus. & Prop. Cts. Queen's Bench Div. Com. Ct.) (Eng.) (summarizing the Judge of the London High Court. The opinion from the London High Court is not available to be read, however, the court of appeals summarizes and sometime quotes from his opinion. The article will note when the Court of Appeals is summarizing and when it is quoting the London High Court.).

36. *See Kabab-Ji SAL*, [2020] EWCA (Civ) 6, [¶ 12] (quoting the Judge of the London High Court).

37. *See id*. ¶¶ 12-15 (summarizing the Judge of the London High Court).

38. *See id*. ¶¶ 16-17 (summarizing the Judge of the London High Court).

39. *Id*. ¶ 16 (quoting Article 14.3 of the FDA. Article 15 of the FDA state that "This Agreement [FDA] shall be governed by and construed in accordance with the laws of England").

40. *See id*. (summarizing the Judge of the London High Court).

The High Court went on to the second question of whether KFG is considered a party to the arbitration agreement under English law.[41] According to the High Court, a "No Oral Modification" clause is strictly applied and is difficult to overcome.[42] It states that "conduct is plainly not enough" to prove that KFG became a party to the arbitration agreement or the FDA.[43] Thus, the High Court ruled that the choice of law governing the arbitration agreement was English law; therefore, KPG did not become a party to either the arbitration agreement or the FDA.[44] The High Court adjourned enforcement of the arbitral award and stayed the judgement until determination by the Paris Court of Appeal.[45]

B. English Court of Appeals Decision

Before the Paris Court of Appeal could render its decision, Kabab-Ji appealed the High Court's decision to the English Court of Appeal ("ECA").[46] However, the ECA affirmed the holding of the High Court's decision and entered determination that the arbitral award should not be enforced regardless of the Paris Court of Appeal.[47] The ECA agreed with the lower court that the express choice of law governing the arbitration agreement is English law.[48] It specifically analyzed Articles 1, 14, and 15 and concluded that English law applies to the entire FDA, including the arbitral agreement.[49] The ECA stated that Article 14.5, the seat of arbitration in Paris, had no bearing on the choice of law governing the arbitration agreement.[50]

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41. *See id*. ¶¶ 18-19 (summarizing the Judge of the London High Court).

42. *See Kabab-Ji SAL,* [2020] EWCA (Civ) 6, [¶¶ 20-21] (summarizing the Judge of the London High Court. The Judge states that "No Oral Modification" clause should be strictly applied as the clause is one, agreed to by the parties and two, creates certainty around what is required to amend the contract.).

43. *Id*. ¶¶ 23-24 (summarizing the Judge of the London High Court).

44. *See id.* ¶¶ 28-30 (quoting the Judge of the London High Court); *see also* Fox, *supra* note 1.

45. *See id*. ¶ 30 (quoting the Judge of the London High Court. The High Court believed that that the principle of comity was necessary in respect to this dispute.).

46. *See Kabab-Ji SAL,* [2020] EWCA (Civ) 6, [¶ 32]; *see also* Fox, *supra* note 1.

47. *See Kabab-Ji SAL,* [2020] EWCA (Civ) 6, [¶ 86]; *see also* Fox, *supra* note 1.

48. *See, e.g.*, *Kabab-Ji SAL,* [2020] EWCA (Civ) 6, [¶ 62].

49. *See* Martin Kwan, *Kabab-Ji, Determining the Governing Law for the Arbitration Agreement Under English Law, The Emerging Focus on the Express Choice of the Parties*, WOLTERS KLUWER: KLUWER ARBITRATION BLOG (Feb. 24, 2020), http://arbitrationblog.kluwerarbitration.com/2020/02/24/kabab-ji-determining-the-governing-law-for-the-arbitration-agreement-under-english-law-the-emerging-focus-on-the-express-choice-of-the-parties/; *see also Kabab-Ji SAL*, [2020] EWCA (Civ) 6, [¶ 62].

50. *See Kabab-Ji SAL,* [2020] EWCA (Civ) 6 [¶ 68].

The ECA reaffirmed the High Court's ruling that under English law KFG is not a party to either the arbitration agreement or the FDA.[51] The court stated that even though Kabab-Ji had evidence of conduct that showed KFG treated itself as a party, it did not take away from the stringent requirements of the "No Oral Modification" clause.[52] The ECA disagreed with the High Court on adjournment of the arbitral award until the Paris Court of Appeal renders a decision, concluding that there is little evidence that would allow enforcement of the award under English law.[53]

IV. FRENCH CHOICE OF LAW JURISPRUDENCE

A. Paris Court of Appeal Decision

KFG filed an annulment application before the Paris Court of Appeal ("PCA") to annul the arbitral award during the English proceedings.[54] KFG argued that the arbitration agreement is governed by English law, while Kabab-Ji argued that French law applied.[55] On June 23, 2020, the PCA dismissed the annulment proceeding and upheld the arbitral award in favor of Kabab-Ji contrary to the English courts.[56] While the English courts focused on the arbitration agreement within the context of the FDA, the PCA applied the "substantive rule of international arbitration" ruling that the arbitration agreement "is legally independent from the underlying contract".[57] Thus, the "substantive rule of international arbitration" required that French law be applied to the arbitration agreement notwithstanding that the FDA's choice of law is English law.[58] The PCA further stated that, by KFG's conduct and performance, it became a party to the arbitration agreement under French law.[59]

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51. *See id.* ¶ 80.

52. *See id*.

53. *See id*. ¶ 84.

54. *See* AKIN GUMP STRAUSS HAUER & FELD LLP, *supra* note 20, at 3.

55. *See, e.g.,* Paris Cour'd appel [CA] [Paris Court of Appeal] Paris, Pole 1 Chamber 1, June 23, 2020, 17/22943, 4 (Fr).

56. *See id*. at 1, 10.

57. *Id.*; *see also Kabab-Ji SAL*, [2020] EWCA (Civ) 6.

58. Paris Cour'd appel [CA] [Paris Court of Appeal] Paris, Pole 1 Chamber 1, June 23, 2020, 17/22943, 5 (Fr).

59. *See id*. at 5-7.

B. Analysis of the Paris Court of Appeal's Ruling

The PCA's holding is not surprising considering the approach that French courts typically take with interpretation of implied choice of law in arbitration agreements.[60] French courts believe that international arbitration agreements are governed by a law of the seat different from the applicable choice of law that the parties choose in the general contract.[61] Known as the separability doctrine, the arbitral agreement is presumed to be seen as a separate entity from the underlying contract.[62] The idea is to insulate the arbitration agreement from challenges to the general contract that would also void the arbitration agreement.[63] In effect, French courts see arbitration agreements like the one in this case as "autonomous" from any national legal system and subject to international public policy.[64] This approach, called the "substantive rules method," is a decisively pro-arbitration stance by the French courts that is meant to "give maximum effect to the parties' agreement to arbitrate, without regard to the idiosyncrasies of national law."[65] According to this method, the arbitration agreement's existence and validity should be examined by a French court in accordance with law set by international conventions such as the 1958 New York Convention.[66]

The New York Convention dictates in Article V(1)(a) the international choice-of-law two-limb rule for determining the law governing the arbitration agreement.[67] The rule's first limb provides that the arbitration agreement's validity rests upon "the law to which

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60. *See, e.g.*, Leila Kazimi, *Can't Budge: The Curious Case of Kabab-Ji and the New York Convention*, WOLTERS KLUWER: KLUWER ARBITRATION BLOG (Nov. 15, 2021), http://arbitrationblog.kluwerarbitration.com/2021/11/15/cant-budge-the-curious-case-of-kabab-ji-and-the-new-york-convention/.

61. *See* GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 439-40 (2009); *see also* PHILIPPE ET. AL., GOLDMAN, FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERICAL ARBITRATION ¶ 436 (Emmanuel Gaillard & John Savage eds., 1999) (This interpretation was first articulated by the Cour de Cassation, the French court of last resort of all civil matters, in the *Dalico* case).

62. *See* BORN, *supra* note 61, at 447-49; *see also* Kazimi, *supra* note 60 ("separability of the arbitration agreement . . . is a long-established principle under French law").

63. *See* BORN, *supra* note 9, at 50.

64. *See* BORN, *supra* note 61, at 440, 504; *see also* PHILIPPE, *supra* note 61, ¶¶ 412, 436 ("[T]he existence and validity of the arbitration agreement are held to be governed by substantive rules adopted to the international nature of arbitration").

65. BORN, *supra* note 61, at 440-441 ("[T]he parties' underlying contract is subject (like all normal contractual relations) to national substantive legal regimes, the parties' arbitration agreement is subject to *sui generis* legal regime apparently derived from principles of international law understood by French courts"); *see also* PHILIPPE, *supra* note 61, ¶ 436.

66. *See* PHILIPPE, *supra* note 61, ¶¶ 442, 449, 450.

67. *See* Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. V(1)(a), June 10, 1958, 330 U.N.T.S. 40; *see also* Kazimi, *supra* note 60.

the parties have subjected it" or in other words, the law chosen by the parties.[68] If the parties fail to indicate a choice then the second limb or default rule will apply; the arbitration agreement's choice of law would be "the law of the country where the award was made" or the law of the seat of arbitration.[69] The rationale for the default rule is due to the idea that parties implicitly agree to be governed by the law of the arbitral seat when they chose the seat of arbitration.[70]

Therefore, by the French implied choice of law jurisprudence, the PCA applied the separability doctrine.[71] Since there was no express choice of law provision within the arbitration agreement, the PCA applied the second limb to the arbitration agreement where French law is the seat of arbitration.[72] This holding is in conformity with the text of Article V(1)(a) of the New York Convention.[73] Thus, the decision reached by the PCA is a plausible interpretation that is based on French choice of law jurisprudence. However, as seen above, such an interpretation is not the only governing choice of law provision.

V. ENGLISH CHOICE OF LAW JURISPRUDENCE

A. U.K. Supreme Court's Decision

The U.K. Supreme Court ("UKSC") issued its ruling on October 27, 2021 and upheld the ECA's decision refusing recognition and enforcement of the arbitral award.[74] Similarly to the French and English Courts, the first question considered by the UKSC is what law governed the arbitration clause.[75] The UKSC first examined the two-limb rule

68. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *supra* note 67; *see also* Kazimi, *supra* note 60.

69. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *supra* note 67; *see also* Kazimi, *supra* note 60.

70. *See* BORN, *supra* note 61, at 471.

71. *See* Paris Cour'd appel [CA] [Paris Court of Appeal] Paris, Pole 1 Chamber 1, June 23, 2020, 17/22943, 5 (Fr).

72. *See id.*; *see also* Kazimi, *supra* note 60.

73. *See* BORN, *supra* note 61, at 470.

74. *See* Kabab-Ji SAL v. Kout Food Group [2021] UKSC 48 [¶ 93] (appeal taken from [2020] EWCA Civ 6) (UK).

75. *See id.* ¶¶ 22, 10-14 (The court takes note that this question falls under Section 103 of the Arbitration Act 1993 that transposed Article V(1)(a) into English law. Section 103 replicates almost exactly the wording of Article V(1)(a) of the 1958 New York Convention.).

under Article V(1)(a), which is discussed above.[76] The UKSC then stated that the purpose of the New York Convention is to establish a "single, uniform set of rules governing the recognition and enforcement of the international arbitration agreements and awards."[77]

However, the UKSC noted that there is no consensus among national courts over whether the choice of law in the general contract was strong enough to indicate that the parties also intended it to be expanded to the arbitration agreement.[78] Whereas the opposing view is that the parties were intending to separate the arbitral agreement and apply the law of the arbitral seat.[79] With no consensus, the English courts must then form its own opinion about what choice of law applied to the arbitral agreements based on first principles that are deduced from English Contract Jurisprudence.[80]

The court expressed, "a general choice of law to govern a contract containing an arbitration clause should normally be sufficient to satisfy the first rule in article V(1)(a)."[81] Focusing on the language of Article V(1)(a), the court commented that the word "indication" does not necessarily require express agreement to meet the first limb.[82] The court found that when a choice of law for the general contract is specified this gives sufficient "indication" of which law should govern the arbitration agreement regardless of the seat of arbitration.[83] It concluded that when analyzing the FDA, the general choice of law clause gave sufficient indication that the parties wanted the full contract, including the arbitration agreement, to be governed by English law.[84] Therefore, applying English law to the arbitration agreement, KFG was not a party to the arbitral agreement and hence the award should not be enforced.[85]

76. *See Kabab-Ji SAL*, [2021] UKSC 48 [¶ 26].

77. *Kabab-Ji SAL*, [2021] UKSC 48 [¶ 31] (the court takes note that the purpose of Section 103 is to give an interpretation that conforms to the 1958 New York Convention).

78. *See id*. ¶ 32.

79. *See id*.

80. *See id*. (The court states that there is nothing approaching consensus on this question that would give a reason for English courts to adopt the same approach).

81. *Id*. ¶ 33.

82. *Kabab-Ji SAL*, [2021] UKSC 48 [¶ 33] ("indication signifies that something less than an express and specific agreement will suffice").

83. *See id*. ¶ 35.

84. *See id*. ¶ 39.

85. *See id*. ¶ 93.

B. Analysis of the U.K. Supreme Court's Holding

The UKSC's holding is unsurprising given the precedents that English courts have relied on in regard to determining the governing law of arbitration agreements.[86] In its ruling, the UKSC relied upon its decision in *Enka v. Chubb* to reach its conclusion.[87] *Enka* dealt with a contractual dispute where Chubb Russia tried to bring a claim against Enka in Russian court in breach of the arbitration agreement within their underlying contract.[88] One of the issues in the case was whether the general contract's choice of law provision controlled which law applied to the arbitration agreement or the whether the law of the seat applied.[89]

In *Enka*, the UKSC found that the choice of law governing the main contract gave parties' sufficient indication to determine the governing law of an arbitration agreement as long as the agreement remained valid under that law.[90] In *Enka* the UKSC denied that the separability doctrine required a court treat an arbitration agreement separate when determining the governing law, in contrast to the French courts.[91] The UKSC stated that applying the underlying contract's choice of law to the arbitration provided certainty, consistency, and coherence.[92] The UKSC in the Kabab-Ji case extended the *Enka* principles to the enforcement of the award.[93]

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86. *See, e.g.*, Randa Adra et al., *UK Ruling Evinces Conflict in Int'l Award Enforcement*, LAW360 (Nov. 9, 2021), https://plus.lexis.com/document/?pdmfid=1530671&crid=b06000c7-749f-4d6e-8ef8-203ab2310821&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A641X-D361-JK4W-M2P7-00000-00&pdcontentcomponentid=122100&pdworkfolderlocatorid=NOT_SAVED_IN_WORKFOLDER&prid=7b7567a7-fd95-452e-b015-ea18ca91be3b&ecomp=ff4k&earg=sr0&cbc=0%2C0.

87. *See id.*; *see also* Kazimi, *supra* note 60; *see also* Swaroop, *supra* note 15.

88. *See* Enka Insaat Ve Sanayi AS v. OOO Ins. Co. Chubb [2020] UKSC 38, [¶¶ 13-17] (appeal taken from [2020] EWCA Civ 574) (UK) (Enka filed an anti-suit injunction in English courts to force Chubb Russia to arbitrate their dispute); *see also* Mihaela Maravela, *Enka v Chubb Revisited: The Choice of Governing Law of the Contract and the Law of the Arbitration Agreement*, WOLTERS KLUWER: KLUWER ARBITRATION BLOG (Oct. 11, 2020), http://arbitrationblog.kluwerarbitration.com/2020/10/11/enka-v-chubb-revisited-the-choice-of-governing-law-of-the-contract-and-the-law-of-the-arbitration-agreement/.

89. *See, e.g., Enka Insaat Ve Sanayi AS*, [2020] UKSC 38 [¶¶ 1- 3].

90. *See Kabab-Ji SAL*, [2021] UKSC 48 [¶ 170] (the English Court of Appeal had decided that the law of the seat of arbitration determined the parties' choice of law for the arbitration agreement); *see also* Adra, *supra* note 86 ("the law of the seat may displace [the substantive law of the contract] to protect that validity").

91. *See Enka Insaat Ve Sanayi AS*, [2020] UKSC 38 [¶ 41].

92. *See id.* ¶ 53.

93. *See Adra*, *supra* note 86; *see also* Kazimi, *supra* note 60.

According to the English courts, the choice of law provisions in the underlying contract meet the first limb in the Article V(1)(a) rule.[94] In comparison, the French courts analyze arbitration agreements under a separability doctrine and without an express choice of law clause, it applies the second limb of Article V(1)(a).[95] Even as the two jurisdictions diverge on the validity of the arbitration, both approaches seem plausible under Article V(1)(a) as they meet different limbs of the same rule. The next section examines why both interpretations are plausible due to a deficiency in the 1958 New York Convention and will propose a solution to reconcile these two approaches to ensure the uniformity of international commercial arbitration.

VI. RECONCILIATION THROUGH THE VALIDATION PRINCIPLE

A. The Deficiency of the New York Convention

The source of the divergence in the national courts is whether a general contract's choice of law or the law of the seat applies to an arbitration agreement without an express choice of law provision.[96] This divergence does not bode well for international commercial arbitration because it creates uncertainties around contract drafting and an award's validity while also increasing party costs and the risk of forum shopping.[97]

One of the problems is whether Article V(1)(a)'s rule applies to both the recognition of arbitration agreements and arbitral awards.[98] Under the New York Convention, Article V addresses the recognition of arbitral awards, while Article II deals with recognition of arbitration agreements.[99] Article V(1)(a) alleviates the conflict of laws in regard to arbitral awards, while Article II(1) does not deal with which governing law is applicable to the validity of arbitration agreements.[100] While commentators believe that Article V(1)(a) should apply to Article II(1), there are still some national courts that have taken the opposite approach and hold that in the "absence of any such choice of law rule in Article II(1) leaves

94. *See Kabab-Ji SAL,* [2021] UKSC 48 [¶ 39].

95. *See* Paris Cour'd appel [CA] [Paris Court of Appeal] Paris, Pole 1 Chamber 1, June 23, 2020, 17/22943, 5 (Fr); *see also* Kazimi, *supra* note 60.

96. *See* BORN, *supra* note 61, at 422-24.

97. *See id*. at 423 ("This is inconsistent with parties' expectations of an efficient, centralized dispute resolution mechanism in entering into international arbitration agreements").

98. *See id.* at 460-62.

99. *See* BORN, *supra* note 61, at 460-61.

100. *See id*.

courts and arbitral tribunals free to ignore Article V(1)(a) and to apply different standards when deciding whether to enforce an arbitration award."[101]

While the courts deal with the question of enforcement of the arbitral award issued by the ICC, the real issue was over the law that governed the validity of arbitration agreement.[102] The UKSC in *Kabab-Ji* disagreed with the idea that Article V(1)(a) restricted their approach in regard to analyzing the validity of the arbitration agreement.[103] The UKSC noted that English law had to determine the validity of the arbitration agreement when applied to KFG even with contradictory rulings from other national courts.[104]

This question of whether Article V(1)(a) applies to validity of arbitration agreements has led to divergence of national courts decisions regarding choices of law in arbitration agreements with "some courts referring parties to arbitration, and others refusing".[105] Such divergence creates unnecessary costs and forum shopping, destroying the uniformity of international commercial arbitration.[106] The next section will introduce the validation principle, which when applied by national courts can fix this divergence and ensure the protection and integrity of international commercial arbitration.

B. Validation Principle

The variance of how national courts apply choice of law to arbitration agreements has led commentators and courts to devise a mechanism for reconciliation through what is called the validation principle.[107] The validation principle states that "if an international arbitration agreement is substantively valid under any of the laws that may potentially be applicable to it, then its validity will be upheld, even if it is not valid under any of the other potentially applicable choices of law."[108] The validation principle is meant to represent a pro-arbitration partiality giving consideration to arbitration agreements regardless of whether the choice of law of the general contract governs or the law of the arbitration seat

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101. *Id*. at 461-63 ("In particular, these authorities have generally concluded that, at the stage of deciding whether to recognize an arbitration agreement, national courts should apply their own substantive laws (typically on the grounds that the issue is whether their own jurisdiction was excluded)").

102. *See, e.g.*, Kazimi, *supra* note 60.

103. *See Kabab-Ji SAL*, [2021] UKSC 48 [¶¶ 32, 77, 79]; *see also* Adra, *supra* note 86.

104. *See Kabab-Ji SAL*, [2021] UKSC 48 [¶¶ 87, 90].

105. *See* BORN, *supra* note 61, at 461-62.

106. *See id*. at 463.

107. *See* Gary B. Born, *The Law Governing International Arbitration Agreements: An International Perspective*, 26 SING. ACAD. OF L.J. 814 (2014); *see also* BORN, *supra* note 61, at 497-504; Renato Nazzini, *The Law Applicable to the Arbitration Agreement: Towards Transnational Principles*, 65 INT'L & COMP. L. Q. 681, 696-697 (2016).

108. Born, *supra* note 107, at 834.

governs.[109] As long as it is valid under one choice of law, courts would enforce the arbitration agreement.[110] The purpose of the validation principle is to make courts "slow in finding that the agreement is invalid based on the technicalities of the applicable law."[111] Gary B. Born, an arbitration scholar, states that it makes no sense that the parties intended to use the choice of law of the underlying contract to invalidate the arbitration agreement.[112] The validation principle gives effect to the parties' true intentions, which is to arbitrate their disputes.[113]

The validation principle is consistent with the purpose and objectives of the New York Convention, which is to create an effective arbitration enforcement regime.[114] It is supposed to "facilitate the recognition and enforcement of international arbitration agreements" that are uniformly applied.[115] Specifically, Article II and Article V(1)(a) requires national courts to give effect to parties' choice of law governing arbitration agreements whether explicit or implicit.[116] The New York Convention "recognizes that parties ordinarily intend that the law governing their international arbitration agreement is the law that makes that agreement work and that will enforce it effectively."[117] The Convention has been generally interpreted to include an anti-discrimination posture which prevents national laws with "idiosyncratic or discriminatory rules of validity or formation" to invalidate international arbitration agreements.[118] The validation principle would ensure that such discriminatory laws and rules do not interfere with the pro-arbitration purpose of the New York Convention.[119]

International commercial arbitration agreements center around the idea that these agreements are "inherently international in character and are "not connected abstractly to

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109. *See* BORN, *supra* note 61, at 498.

110. *See* Nazzini, *supra* note 107, at 697.

111. *Id*. (The validation principle comes from "well-established contract law doctrine whereby a clause in a contract must be construed so as to be given effect instead of being invalidated").

112. *See* Born, *supra* note 107, at 835 ("The opposite is equally true: it does not make sense to assume that a choice of law governing the arbitration clause which would invalidate that clause").

113. *See id*.

114. *See* BORN, *supra* note 61, at 498; *see also* Born, *supra* note 107, at 834.

115. Born, *supra* note 107, at 836.

116. *See id.* at 837.

117. BORN, *supra* note 61, at 501.

118. *Id*. at 569.

119. *See id*. at 568-69.

one particular national jurisdiction."[120] Understanding the parties' expectations around the arbitration agreements "requires reference to the parties' objective of obtaining efficient resolution of international disputes and, in particular of overcoming the peculiar jurisdictional and choice-of-law uncertainties that ordinarily accompany transnational transactions."[121] In other words, the parties' objective in entering international arbitration agreements is to ensure the validity and enforceability of agreements regardless of different jurisdictional choice of law rules.[122] The validation principle requires that the choice of law which governs the arbitration clause be the "law of jurisdiction which gives effect to the parties objective' in entering into that agreement."[123]

The validation principle has been adopted in at least some form by different courts across the world including Switzerland, France, and the United States.[124] English courts have recognized its existence and have applied it in cases such as *Enka*.[125] In *Enka*, the UKSC stated that the potential invalidity of an arbitration agreement because of the general contract's choice of law provision "may support an inference that it was intended to be governed by a different law from the other provisions of the contract."[126]

However, the UKSC in *Kabab-Ji* denies that the validation principle applies here.[127] The UKSC stated the validation principle "is a principle of contractual interpretation" which does not apply to the formation of contracts.[128] The UKSC further reasoned that the validation principle does not apply to "validity in the expanded sense in which that concept is used in article V(1)(a)."[129] The UKSC is mistaken about the context of international commercial arbitration; the formation of an arbitration agreement is governed by the choice of law that would apply if the agreement has existed.[130] This is seen specifically in Article

120. *Id.* at 500.

121. *Id*.

122. *See id.* at 500.

123. *Id*.

124. *See* BORN, *supra* note 61, at 501-02; *see also* Born, *supra* note 107, at 838-46.

125. *See* Enka Insaat Ve Sanayi AS v. OOO Ins. Co. Chubb [2020] UKSC 38, [¶ ¶ 95-109] (appeal taken from [2020] EWCA Civ 574) (UK); *see also* BORN, *supra* note 61, at 499; Born, *supra* note 107, at 840-43.

126. *Enka Insaat Ve Sanayi AS,* [2020] UKSC 38 [¶ 97].

127. *See* Kabab-Ji SAL v Kout Food Group [2021] UKSC 48 [¶¶ 49-52] (appeal taken from [2020] EWCA Civ 6) (UK); *see also* Kazimi, *supra* note 60.

128. *Kabab-Ji SAL,* [2021] UKSC 48 [¶ 51] ("The validation principle presupposes that an agreement has been made which may or may not be valid. It is not a principle relating to the formation of contracts which can be invoked to create an agreement which would not otherwise exist").

129. *Id*. ¶ 52.

130. *See* BORN, *supra* note 61, at 451 ("[A]uthority in more general choice-of-law contexts rejects [the view that there is no basis for applying the choice of law that the parties arguably agreed when one party denies

V(1)(a) which requires the parties' alleged choice of law to apply to the formation of the arbitration agreement.[131] English law also recognizes that when dealing with formation questions, the punitive choice of law applies to decide the existence of the underlying contract.[132] It would be counterintuitive to assume that the validation principle would only extend to the interpretation and not its formation as it would allow "idiosyncratic or discriminatory rules of validity or formation" to invalidate international arbitration agreements.[133]

Thus, the English courts should have applied the validation principle to this case regardless of its view of whether French law or English law applied. The UKSC should have realized that there existed two plausible choices of law and selected the law that would uphold the arbitral agreement. Under French law, the arbitral agreement is valid and hence the arbitral award rendered by the ICC tribunal should be enforced.[134] Therefore, the validation principle is a useful mechanism in ensuring that arbitral agreements and awards are uniformly enforced.

VII. CONCLUSION

The existence of international commercial arbitration relies on national courts to apply arbitral enforcement uniformly across the world. The purpose of international commercial arbitration is to ensure effective and efficient resolution of disputes instead of undertaking extensive litigation. The system of international commercial arbitration breaks down in cases, like the *Kabab-Ji v. KFG*, where national courts diverge in the interpretation of arbitration agreements and awards. The validation principle is a backstop to ensure the effectiveness of international commercial arbitration and is used to guarantee that the pro-enforcement objective of the 1958 New York Convention is effectively put into practice by national courts.[135]

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the validity of the arbitration agreement], holding that the formation of an agreement is governed by the law that would apply if the agreement had existed").

131. *See id.* at 452 ("This rule specifically applies by its terms, and its rationale, where one party denies that its actions gave rise to any arbitration agreement at all").

132. *See* BORN, *supra* note 61, at 451-52 n.202 (quoting L. COLLINS, DICEY, MORRIS & COLLINS ON THE CONFLICT OF LAWS ¶¶ 32R-154., 32-158 (Lord Collins et al. eds., 14th ed., 2006).

133. *Id.* at 569.

134. *See* Paris Cour'd appel [CA] [Paris Court of Appeal] Paris, Pole 1 Chamber 1, June 23, 2020, 17/22943, 5 (Fr).

135. *See* Born, *supra* note 107, at 846.